84-262

No. .....

In The

Supreme Court of the United States

October Term, 1984

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the opinion below, invalidating rights-of-way granted over a period of thirty years under the sole authority of Section 17 of the Pueblo Lands Act, conflicts with decisions of this Court requiring deference to a reasonable administrative statutory interpretation in that:

A. The interpretation is manifestly supported by statutory provisions, gives meaning to each part of Section 17, and effectuated the intention of the Act;

B. The interpretation is consistent with this Court's construction of the Indian Non-Intercourse Act of 1834;

C. The interpretation comports with the legislative history of the Act, was adopted contemporaneously to the enactment of the Pueblo Lands Act and was consistently applied thereafter.

II. Whether the opinion below conflicts with decisions of this Court and other circuits in concluding that a quiet title consent decree settling title to real property interests is deprived of its *res judicata* effect solely because:

A. The consent decree entered more than 50 years prior to the present action does not state that the agreed to dismissal is "with prejudice";

B. A decision in the former action in favor of the party asserting *res judicata* arguably would have been erroneous.

LIST OF PARTIES

The names of all parties to this action are included in the caption.

LISTING OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

The Mountain States Telephone and Telegraph Company (d/b/a Mountain Bell) is a wholly-owned subsidiary of Mountain Bell Holdings, Inc., which also owns Mountain Bell Technologies, Inc. U S West, Inc. is the parent corporation of Mountain Bell Holdings, Inc., and is also the parent corporation of the following subsidiaries, which are wholly owned:

BetaWest Properties, Inc.

LANDMARK PUBLISHING Company
U S WEST DIRECT Company

NetTech Communications Corporation

NewVector Communications, Inc.
NewVector Retail Service, Inc.

Northwestern Bell Corporation
Northwestern Bell Information Technologies, Inc.
Northwestern Bell Telephone Company

Pacific Northwest Bell Telephone Company
Comm+ Systems, Inc.

U S WEST Financial Services, Inc.

U S West Holdings, Inc.

U S WEST, Inc.

U S WEST Services, Inc.
d/b/a FirstTel Information Services, Inc.
d/b/a Interline Communication Services, Inc.

U S West Systems

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, the Mountain States Telephone and Telegraph Company ("Mountain Bell"), respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered May 14, 1984.

OPINIONS BELOW

The United States District Court for the District of New Mexico granted summary judgment in favor of the Pueblo of Santa Ana ("Pueblo"), on June 2, 1982, entered on June 3, 1982, (App. B at 14) amended July 13, 1982, entered July 14, 1982 (App. B at 23), to allow for an interlocutory appeal. The opinion of the Court of Appeals for the Tenth Circuit affirming the District Court's grant of summary judgment in favor of the Pueblo was filed on May 14, 1984. (App. A at 1.) Both the District Court and Tenth Circuit Court Opinions are unreported.

JURISIDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Tenth Circuit was filed on May 14, 1984, and Judgment was entered the same day. (App. A at 1, and App. C at 24.) Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Tenth Circuit exists by virtue of 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

STATUTES INVOLVED

The following statutes are involved in the appeal:

Act of June 7, 1924, 43 Stat. 636.

Act of June 30, 1834, C. 161, Sec. 12, 4 Stat. 730, 25 U.S.C. § 177.

STATEMENT OF THE CASE

The Pueblo of Santa Ana, one of the numerous Indian Pueblos of New Mexico, brought this action for trespass which the Pueblo alleged to have resulted from the use of a right-of-way upon its lands. Jurisdiction in the District Court was alleged and admitted under 28 U.S.C. § 1362. The Amended Complaint, filed on February 19, 1981, alleged that Mountain Bell or its predecessors lacked a valid right-of-way across Pueblo lands for its transmission lines dating from 1905 to the date of the filing. (Rec., Vol. I, 1.) That Amended Complaint sought an accounting for net rents and profits for the period of unauthorized use, as well as an injunction against further unauthorized use, and additionally sought actual and punitive damages.

Facts Regarding Motion for Partial Summary Judgment on Section 17 Right-of-Way.

Mountain Bell filed a Motion for Partial Summary Judgment seeking a ruling that, from and after February 23, 1928, it had occupied the premises of the Pueblo pursuant to a valid right-of-way, and was, therefore, not a trespasser. Mountain Bell established that on February 23, 1928, the Pueblo's officers executed a right-of-way agreement, granting to Mountain Bell "an easement to construct, maintain and operate a telephone . . . pole line," across the Pueblo's property. (Rec., Vol. I, 26.) That agreement was approved by the Secretary of the Interior on April 13, 1928, expressly acting pursuant to Section 17 of the Act of June 7, 1924, 43 Stat. L. 636. (Rec., Supp. Vol. I, 42-47.) (The Act of June 7, 1924, commonly known as the Pueblo Lands Act, construed by the Opinions below, is found at App. D at 25, Section 17 at 37.)

Following the June 7, 1924 enactment of the Pueblo Lands Act, the Southern Pueblos Agency, Bureau of Indian Affairs ("BIA") approved fifty-nine additional conveyances of rights-of-way and one other form of conveyance pursuant to Section 17, the first being approved in April, 1926 and the last in December, 1959. (Rec., Vol. II, 6.) The Pueblo of Santa Ana granted nine such rights-of-way between April, 1926 and March, 1958. (Rec., Vol. II, 7.) Each instrument was granted by the Pueblo and was approved at the level of Secretary or Assistant Secretary of the Interior (Rec., Vol. II, 7) and not at the local level.

Facts Regarding Motion for Partial Summary Judgment on Res Judicata Issue.

Mountain Bell's Summary Judgment Motion also maintained that the Plaintiff's claims for trespass were barred on *res judicata* grounds by reason of a final judgment entered in a 1927 quiet title suit involving the same parties, the same telephone line and the same claims. In accordance with Section 2 of the Pueblo Lands Act, the United States, on behalf of the Pueblo of Santa Ana, filed *United States of America as Guardian of the Pueblo of Santa Ana in the State of New Mexico, Plaintiff v. Charles F. Brown, et al., Defendants,* Civil Action No. 1814 in Equity (D.N.M. 1927) ("*U.S. v. Brown*"), to quiet title to certain lands of the Pueblo.

Mountain Bell was joined by service of process in that action. The United States asserted that Mountain Bell and others were in trespass and claimed interests in portions of Pueblo lands which constituted a cloud upon the title of the Pueblo. (Rec., Supp. Vol. I, 52.) The complaint requested the Court to quiet title to the property in the Pueblo and to enjoin the alleged trespasses.

During that suit, and in partial performance of an agreement between the Pueblo's attorney, Mr. George A. H. Fraser, and Mountain Bell's attorney, Mr. Milton Smith (Rec., Supp. Vol. I, 1-9), Mountain Bell obtained Secretarial approval of a new right-of-way agreement granted by the Pueblo on February 23, 1928. (Rec., Supp. Vol. I, 42-47.) Following the United States attorney's assurances that he would not proceed further against Mountain Bell if its title would "presently be perfected" (Rec., Supp. Vol. I, 5), Mountain Bell forwarded the executed right-of-way agreement to Washington for Secretarial approval. (Rec., Supp. Vol. I, 6.) The 1928 right-of-way was approved by Mr. John H. Edwards, Assistant Secretary of the Interior "pursuant to § 17 of the Act of June 7, 1924, " on April 13, 1928. (Rec., Supp. Vol. I, 42-47.)

On May 23, 1928, Mountain Bell informed Mr. Fraser of the approval, reiterated its understanding that it would now be dismissed from the 1927 quiet title action, and offered to sign a written stipulation if one was desired. (Rec., Supp. Vol. I, 7.) No stipulation was ever presented to Mountain Bell. On May 31, 1928, the United States moved to dismiss Mountain Bell on the grounds:

> That subsequent to the institution of this suit said defendant has obtained a deed from the Pueblo of Santa Ana approved April 13, 1928, by the Secretary of the Interior in accordance with Section 17 of the Pueblo Lands Act of June 7, 1924, and that thereby said defendant has obtained, for an adequate consideration, good and sufficient title to the right of way in controversy herein between plaintiff and said defendant.

(Rec., Supp. Vol. I, 57.)

Pursuant to that Motion, the court dismissed Mountain Bell from the 1927 suit by Order dated May 31, 1928, reciting that:

> it appears to the court that since the institution of this suit said defendant has secured good and sufficient title to the right of way and premises in controversy herein between plaintiff and said defendant by deed from the Pueblo of Santa Ana approved April 13, 1928, by the Secretary of the Interior in accordance with the provisions of Section 17 of the Pueblo Lands Act of June, 1924 . . . .

(Rec., Supp. Vol. I, 58). Following the dismissal of Mountain Bell from that prior lawsuit on May 31, 1928, until 1980, neither the Pueblo nor anyone on its behalf notified Mountain Bell of any contention that it did not have the right to maintain the telephone line in question across the Pueblo's land.

Statement of Proceedings

On June 3, 1982, Judge Mechem entered his Memorandum Opinion and Order (App. B at 14) granting partial summary judgment for the Pueblo. The Memorandum Opinion did not discuss any of Mountain Bell's affirmative defenses, but nevertheless ordered that the "Pueblo shall recover damages from April 18, 1928 to the date [Mountain Bell's] telephone and telegraph line was removed." The Pueblo's prayer for punitive damages was expressly denied. (App. B at 22.)

Pursuant to an Order entered on July 14, 1982 (App. B at 23), Mountain Bell applied to the Court of Appeals for Tenth Circuit for an interlocutory appeal on July 23, 1982. Thereafter, in December, 1982, sixteen other law-

suits were filed in the District of New Mexico alleging Section 17 violations. (App. F.) Mountain Bell was named in 5 of these actions. The defendants include individuals, corporate entities, the State of New Mexico and its subdivisions, and the Department of the Interior.

On January 28, 1983, the Circuit Court granted Mountain Bell permission for interlocutory appeal. The Tenth Circuit filed its Memorandum Opinion and Order affirming the decision of the District Court on May 14, 1984 (App. A at 1.) Judgment was entered on the same day. (App. C at 24.) Petitioner here seeks review of that opinion and judgment.

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REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit Opinion, In Voiding Rights-Of-Way Granted By Pueblos And Approved By The Secretary Of The Interior Pursuant To Section 17, Decides An Important Question Of First Impression Concerning A Federal Statute Which Has Not Been, But Should Be, Settled By This Court.

No decision of this Court has construed the force and effect of the Pueblo Lands Act on the Pueblo Indians or those with whom they conduct business. The Tenth Circuit decision in this case invalidates an administrative interpretation of that Act utilized by the BIA in approving at least sixty rights-of-way over a period of thirty years across lands of the Pueblos of New Mexico. The New Mexico Pueblos are a unique form of Indian

tribe under Federal law. This Court has addressed their status and history leading up to the enactment of the Pueblo Lands Act. *See United States v. Candeleria,* 271 U.S. 432 (1926); *United States v. Sandoval,* 231 U.S. 28 (1913); *United States v. Joseph,* 94 U.S. 614 (1877); *see also, United States v. Pico,* 5 Wall. 536, 540 (1867); *Chouteau v. Molony,* 16 How. 203, 237 (1853). Under Spanish and Mexican law, Pueblo Indians had full title to their lands, but were regarded as under a state of tutelage, and could alienate their lands only under governmental supervision. *United States v. Candelaria,* 271 U.S. at 432. Their rights under Spanish and Mexican law were considered to fall within the general confirmation of the Treaty of Guadalupe-Hidalgo, and no treaty ever was negotiated with any of the Pueblos. F. Cohen, *Handbook of Federal Indian Law,* 387 (1942 ed., Univ. of N.M. Press Reprint).

Following the impressment of United States Territorial status upon New Mexico, it was initially held that, because of their "peaceable, industrious" character, and because they lived in "fixed communities, each having its own municipal or local government," the Pueblo Indians were not within the class of Indians to whom a trust relationship with the United States was extended by the Act of February 27, 1851, 9 Stat. 574. *United States v. Joseph,* 94 U.S. at 616-617. Subsequent actions of the Secretary, and the New Mexico Enabling Act, Act of June 30, 1910, 36 Stat. 557, caused this Court to cast doubt upon that conclusion in *United States v. Sandoval,* 231 U.S. at 48-49.

To resolve uncertainties as to the status of title of many non-Indians to whom interests in Pueblo lands had been conveyed prior to the *Sandoval* decision, the Pueblo

Lands Act was enacted. Section 17 of the Pueblo Lands Act was the only provision of that Act that arguably authorized the prospective conveyance of any interests in its lands by a Pueblo. Because the Opinion below invalidates all rights-of-way granted by the BIA pursuant to that Section, Certiorari should be granted to resolve whether the agency's construction, contemporaneously adopted and consistently applied thereafter, so conflicted with statutory authority as to mandate voiding all rights of grantees obtained and maintained in reliance upon that Act.

A. The Tenth Circuit Opinion Conflicts With The Language Of Section 17 And The Purpose Of The Pueblo Lands Act.

Because the Tenth Circuit Opinion failed to give meaning to each provision of Section 17 in light of its language and purpose, that Opinion prescribes a construction of Section 17 wholly at odds with that undisputedly placed upon it by those contemporaneously applying it. The Court's failure carefully to parse the statutory provisions prevented it from discerning why the Pueblos, the Interior Department, and non-Indians dealing with the Pueblos all understood Section 17 to authorize the granting of rights-of-way by Pueblos if approved by the Secretary. Section 17 should reasonably be construed to support that contemporaneous construction. Section 17 states:

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by

> Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, *shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.*

(App. D at 37; Emphasis added.) The Tenth Circuit invalidates the contemporaneous construction of the Section based primarily on the conclusion that since the two major clauses of Section 17 were joined by the word "and", the conditions contained in both clauses had to be satisfied. The Court below held, therefore, that since "Congress had provided no method" for conveyances, "the approval of the Secretary [was] meaningless." (App. A at 9.)

The Tenth Circuit's grammatical observation that "and" is a conjunctive cannot support its construction of Section 17.[1] While it is obvious that Section 17 is comprised of two main clauses, those clauses are not dependent and do not create compound conditions, both of which must be satisfied. Rather, the language and focus of each independent clause contrast sharply, and each clause has a different purpose. The second clause expressly concerns the voluntary "sale, grant, lease . . . or . . . conveyance" by a Pueblo, and prescribes that no such conveyance shall be valid unless approved by the Secretary. By contrast, the first clause does not refer to instruments voluntarily granted by a Pueblo. Rather, that clause in referring to titles *"acquired or initiated* by virtue of the laws of the State of New Mexico, or in any other manner," refers to titles or interests obtained in some manner other than by voluntary conveyance, such as by adverse possession or condemnation. These titles, it states, may not be acquired or initiated "except as may hereafter be provided by Congress." The Tenth Circuit erred in engrafting the conditions of the first clause upon the voluntary conveyances that are the subject of the second clause.

1. The punctuation employed, in fact, *supports* the position that the clauses are *independent*. In joining two dependent clauses, a comma prior to the conjunctive word is *not* used. When two independent clauses are joined by a ",and" the ",and" acts as a mark of punctuation like a period or a semicolon, coordinating the two *independent clauses*. See Kierzek and Gibson, *McMillan Handbook of English*, Rule 13, p. 282 (McMillan Co., 1960); Milward, *Handbook for Writers*, Rule 27.A, p. 104 (Holt, Rinehart and Winston, undated).

The failure of the Court below to understand the purpose of the second clause of Section 17 in the statutory scheme is demonstrated by the fact that its holding invalidates the *only* method by which Pueblos were then understood to be empowered to convey. At the time of its passage, no one doubted the ability of the Pueblo to grant interests in property, provided the Pueblo had Secretarial approval. (*See* text at p. 16, n.6, *infra.*) The *second* clause of Section 17 is the only provision of the Pueblo Lands Act which arguably authorizes approved Pueblo grants of rights-of-way, and it was so understood at the time. The Tenth Circuit Opinion results in the illogical conclusion that, at the time of its passage, the second clause of Section 17 was meaningless and would have no object unless and until Congress "hereafter provided," under the first clause, for approved Pueblo conveyances. This construction is in conflict with the well-recognized rule that, in construing legislation, an attempt should be made to give effect to all of its provisions. *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, 261 (1975).

The Pueblo Lands Act uniformly has been construed consistent with the administrative interpretation, in the

manner invalidated by the Opinion below: under Section 17, "the tribal council has a right to make leases and permits on its own initiative subject to the approval of the Department." F. Cohen, *Handbook of Federal Indian Law, supra,* at 104;[2] *see also, The Legal Status of the Indian Pueblos of New Mexico and Arizona,* 57 I.D. 36, 49 (1939); *Alonzo v. United States,* 249 F.2d 189, 195 (10th Cir. 1957), *cert. denied* 355 U.S. 940 (1958); *Pueblo de San Juan v. United States,* 47 F.2d 446, 447 (10th Cir.), *cert. denied,* 248 U.S. 626 (1931). This Court should issue its Writ of Certiorari to decide whether that interpretation should be restored.

B. The Opinion Below Conflicts With Decisions Of This Court In Concluding That The Non-Intercourse Act of 1834 Supports Invalidation Of Section 17 Rights-Of-Way.

The Opinion below failed to consider this Court's recognition of a tribe's power to convey subject to the approval of the United States. The Court of Appeals' conclusion that the Non-Intercourse Act requires compliance with both clauses of Section 17 (App. A at 7-8), is refuted initially by a comparison of 25 U.S.C. § 177 and Section 17. That comparison mandates the conclusion that, in drafting Section 17, Congress employed a statutory model with which it was quite familiar and that figured prominently in the Pueblo Lands Act hearings: the Non-Intercourse Act. The current iteration of that Act provides:

> [N]o purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution . . . .

2. Dr. Cohen also refers to Section 17 as one of "various other special acts [that] have provided for leases of tribal land". *Id.* at 327 (footnotes omitted).

Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177 (App. E.)

By substituting from Section 17 the word "sale" for "purchase" in the 1834 Act quoted above; by substituting from Section 17 "made by any pueblo as a community, or any pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico . . ." for the phrase quoted above "from any Indian nation or tribe of Indians . . ."; and by substituting from Section 17 "first approved by the Secretary of Interior . . ." for the Non-Intercourse Act language "made by treaty or convention entered into pursuant to the Constitution . . .",[3] the Non-Intercourse Act becomes identical to the second provision of Section 17. This textual incorporation of the Indian Non-Intercourse Act in the second provision of Section 17 strongly supports the position that Congress intended that compliance with that clause would satisfy Non-Intercourse Act requirements. Accordingly, the Non-Intercourse Act cannot justify the Tenth Circuit Court's engrafting additional requirements from the first provision of Section 17, *i.e.,* future legislation, onto the sole requirement of the second provision, Secretarial approval.

3. By virtue of the Act of March 3, 1871, c.120, 1, 16 Stat. 566, 25 U.S.C. § 71, the requirement of the Non-Intercourse Act that alienation be made by "treaty or convention entered into pursuant to the Constitution" was supplanted by the power of Congress to legislate unilaterally. *Cherokee Nation v. Hitchcock,* 187 U.S. 294, 305 (1902) (the act of March 3, 1871 made "the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of its legislative power over them . . . .")

The Indian Non-Intercourse Act of 1834, and its predecessor enactments contemplate, rather than condemn, conveyances by tribes with approval of the United States.[4] The notion embodied in the 1834 Non-Intercourse Act of tribal power to convey subject to approval by the United States is reflected in the contemporaneous Supreme Court decision in *Mitchel v. United States,* 9 Pet. 711, 758-759 (1835): "The Indian right to the lands as property was not merely of possession, that of alienation was concomitant; both were equally secured, protected, and guarantied (sic) by Great Britain and Spain, subject only to ratification and confirmation by the license, charter, or deed from the governor representing the king." As stated by Cohen, "[w]hat had been conceded, by way of *dictum,* in *Johnson v. M'Intosh,* namely that Indian title included power to transfer as well as to occupy, is the core of the decision in the *Mitchel* case." Cohen, *Original Indian Title,* 32 Minn. L. Rev. 28, 50 (1947).

United States v. Candelaria further supports this historical understanding of Pueblo power that was embraced in the 1834 Act and, by extension, in Section 17 of the Pueblo Lands Act. In *Candelaria,* Justice Van Devanter

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4. Those Acts were:

> not intended to prevent the alienation of Indian lands and in fact many Indian treaties . . . provided for the alienation of Indian lands to parties other than the United States, notably religious bodies, railroads, or other Indian tribes. . . . And in a few cases, the tribe itself is given authority to sell land to a named grantee or to any purchaser. F. Cohen, *Handbook of Federal Indian Law, supra* at 323 (footnotes omitted).

stated that the application of the 1834 Act to the Pueblos of New Mexico had the effect of "continuing a policy which prior governments had deemed essential to the protection" of the Pueblo Indians. 271 U.S. at 442. The policy to be carried forward, which had been established by the Spanish and Mexican governments, provided that conveyances of Pueblo lands were to "be made 'under the supervision and the approval' of designated authorities." *Id., quoting United States v. Pico,* 5 Wall. 536, 540 (1867). Clearly, the "designated authority" to approve Pueblo conveyances under Section 17 of the Pueblo Lands Act was the Secretary of the Interior.

Therefore, the Opinion below, in invalidating Section 17 rights-of-way across Pueblo lands conflicts with this Court's decisions construing the legislative intendment of the Non-Intercourse Acts. Certiorari should be granted to correct this significant misapprehension of federal law.

C. The Opinion Below Neglects To Consider That The Language Of Section 17 Is Consistent With The Congressional Intent To Allow Pueblo Conveyances With Secretarial Approval.

Mountain Bell found no legislative history specifically pertaining to Section 17 as enacted. The purpose and intent of that Section, however, may be gleaned from the general legislative history of the Pueblo Lands Act,[5] and

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5. In the First Session of the 67th Congress, Senator Bursum of New Mexico introduced two bills pertaining to Pueblo Indian lands. On May 31, 1921, he introduced S.1938 (61 Cong. Rec. S1939, daily ed. May 31, 1921) and on July 19, 1921,

(Continued on next page)

from Congress' understanding of the nature of federal responsibilities to Indian Pueblos. A reading of that history makes clear that 10 years after the *United States v. Sandoval* decision, the sovereign ability of the Pueblos to alienate property with the consent of the United States was not doubted.[6] In the Congressional hearings, concern was expressed, however, as to whether governmental consent was required as a control on alienation—an act of guardianship seemingly required by the *Sandoval* decision. Congress was informed that, since *Sandoval,* the Pueblos were required to submit for Secretarial approval all leases and conveyances.[7] Further, the remarks of Mr. Francis C. Wilson, principle representative for the Pueblos in the Lands Act hearings, indicate that a provision authorizing conveyances by the Pueblos conditioned upon Secretarial approval was desirable.[8]

(Continued from previous page)

he introduced S.2274 (Cong. Rec. S4031, daily ed. July 1, 1921). At the request of then Secretary of the Interior Albert Fall, these bills were not acted upon (Hearings on S.3865 and S.4223 Before a Subcommittee of the Committee on Public Lands and Surveys, United States Senate, 67 Cong., 4th Sess., 282, pp. 7, 31-82, 254 (1923) ("1923 Senate Hearings"). In the Second Session of the 67th Congress, four Pueblo land acts were introduced: two in the House and two in the Senate. In the Senate, Senator Bursum introduced S.3885, and Senator Jones of New Mexico introduced S.4223. In the House, Rep. Snyder introduced H.R. 13452 and Rep. Leatherwood introduced H.R. 13674. Extensive hearings were held on these four bills in both the Senate and the House. (Hearings on H.R. 13452 and H.R. 13674 Before the Committee on Indian Affairs, House of Representatives, 67th Cong., 4th Sess., 413 pp. (1923) ("1923 House Hearings").

6. 1923 Senate Hearings, 72-73, 154-155, 229; 1923 House Hearings, 40-41.

7. 1923 Senate Hearings, 72-73, 154-155.

8. 1923 Senate Hearings, 154-155.

The legislative history contains no indication that a voluntary conveyance by a Pueblo *approved by the Secretary* would be void.

The Tenth Circuit's citation of one House Report, H. R. Rep. No. 787, 68th Cong. 1st Sess. 2 (1924) (App. A at 8), does not support such conclusion. That quotation, which concerned *unauthorized* conveyances of Pueblo lands without any consent or involvement of the United States, does not involve any issue material to the validity of Mountain Bell's right-of-way, which was concededly approved by the Secretary. The Acts' legislative history does not support overturning the administrative construction.

D. The Opinion Below Conflicts With The Reasonable Construction Given The Statute By The Administrative Agency Charged With Its Enforcement For Over Thirty Years And Disregards Reliance By Grantees On That Construction.

Certiorari should be granted to correct the Tenth Circuit's invalidation of an established construction given the statute by the administrative agency charged with its enforcement for over thirty years. *Morton v. Ruiz,* 415 U.S. 199, 201-202 (1974) (decision below asserted to be "inconsistent with the long-established policy of the Secretary [of the Interior] and the Bureau [of Indian Affairs]"); *and Patterson v. Lamb,* 329 U.S. 539, 541 (1947) (decision below upset 25 years of War Department rulings and practices).

The Tenth Circuit did not dispute that the evidence before it established a contemporaneous construction of Section 17. (App. A at 10.) The administrative practice, joined in by the Pueblos, resulted in grants of at least sixty rights-of-way by the Southern Pueblos between April 28, 1926, and December, 1959. Nine of the rights-of-way were granted by the Pueblo of Santa Ana. (Rec., Vol. II, 6.)

Most rights-of-way granted by the Pueblo were granted between 1926 and 1928. However, two rights-of-way were granted to the Bureau of Reclamation, Department of the Interior by the Pueblo in the 1950s. The June 15, 1956 grant (Rec., Vol. II, Ex. 9), was authorized by a Pueblo Resolution, dated December 13, 1955, stating that:

> In view of the fact that regulations of the Department of the Interior governing rights of way (25 C.F.R. 256.19) provide that the Superintendent may approve a right of way for this purpose not to exceed fifty years, it is desired by the Pueblo of Santa Ana that the hereinabove mentioned right of way be approved, in perpetuity, by the Secretary of the Interior under provisions of the Pueblo Lands Act, approved June 7, 1924, 43 Stat. 636.

The Pueblo's June 15, 1956 grant of right-of-way also referred to the June 7, 1924 Act, and another Resolution was passed on August 27, 1957 containing language almost identical to that quoted above. Pursuant to that Resolution, an Agreement dated November 4, 1957, stated that it shall not be "effective until approved by the Secretary of the Interior, pursuant to Sec. 17 of the Act of June 7, 1924, 43 Stat. 636". (Rec., Vol. II, Ex. 8.)

Further record evidence of the contemporaneous construction of Section 17 is contained in correspondence of

the Interior Department. In July, 1924, the Secretary of the Interior had attempted to grant a right-of-way to a railroad across Pueblo lands under the general right-of-way statutes then in effect.[9] In 1925, the Pueblo Lands Board informed the Secretary that, in its opinion, those right-of-way statutes had no application to the Pueblos.[10] The position of the Interior Department concerning that 1925 controversy, related to Congress by the Commissioner of Indian Affairs during 1975 hearings on subsequent legislation, further reflects the then-existing administrative interpretation of Section 17: since the Secretary had no authority to grant rights-of-way across Pueblo Lands at that time, the Department determined that the only way the railroad could obtain the right-of-way was "if the Pueblos would execute a deed for the easement for right-of-way purposes and the transaction was approved by the Secretary of the Interior under the provisions of Section 17 of the Pueblo Lands Act . . . ."[11] Finally, when one Pueblo refused to grant a right-of-way, Congress was implored to intervene, and did so by passing legislation in 1926 that provided for condemnation of Pueblo lands.[12]

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9. Act of March 2, 1899, 30 Stat. 990, 25 U.S.C. §§ 312-318.

10. Hearings on S.217 Before the Subcommittee on Indian Affairs of the Committee of Indian and Insular Affairs, House of Representatives, 94th Cong., 4th Sess., Ser. No. 94-30, p. 2 (1975) ("1975 Hearings"); and *see* H. Rep. 94-800, 94th Cong., 2d Sess. (1976), S. Rep. 91-148, 94th Cong., 1st Sess. (1975). Mr. Fraser, the attorney who presented the Pueblo in *United States v. Brown*, shared this opinion based on the first clause of Section 17. (Rec., Supp. Vol. I, 14-20.)

11. 1975 Hearings, p. 2. Again Mr. Fraser understood this, since he informed the Attorney General in a letter that certain Pueblos would not agree to such a conveyance. (Rec., Supp. Vol. I, 14-20.)

12. Act of May 10, 1926, 44 Stat. 498; 1975 Hearings, p. 2.

The Tenth Circuit's refusal to consider this administrative practice under Section 17 rested on a false premise that this Court should now correct. The Court stated:

> the courts are the final authorities on statutory construction and are not obliged to accept an administrative construction which they deem inconsistent with a statutory mandate or frustrates congressional policy. . . . In our opinion, the administrative actions on which Mountain Bell relies violate the plain congressional intent of § 17 of the Pueblo Lands Act.

(App. A at 10.)

Section 17's two clauses each expressly refer to different means of acquiring interests in property. (*See* text at pp. 9-12, *supra*.) It was erroneous as a matter of law to conclude that two clauses expressly referring to different types of alienation both unambiguously refer to a subject expressly referred to in only one of them, *i.e.*, the validity of a "sale, grant, lease . . . or other conveyance." The conclusion is further suspect because the first clause of Section 17, relied upon by the Tenth Circuit, also refers to matters extraneous to the administrative practice, such as the acquisition or initiation of property rights under state law. Although it may fairly be said that Section 17's two clauses unambiguously speak to two subjects, the Section bristles with ambiguity if all its terms are asserted to have a unitary application. The cases of this Court preclude the invalidation of all rights granted pursuant to such a statute without a full consideration of the administrative record and its entitlement to deference.

The undisputed evidence of long-standing and apparently unwaivering adherence by the Interior Department, the agency charged with application of the Act, was "entitled to great deference, particularly when that interpretation ha[d] been followed consistently over a long period of time." *United States v. Clark*, 454 U.S. 555, 102 S.Ct. 805, 811 (1982); *see also Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 42, n. 27 (1977). This principle should be entitled to even more respect because "the administrative practice at stake [here] 'involve[d] a contemporaneous construction of a statute by the men charged with responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they [were] yet untried and new'." *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961), *quoting Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933). Because the administrative interpretation was a reasonable one, the Tenth Circuit erred by substituting its views for those of the agency. *Udall v. Tallman*, 380 U.S. 1, 4 (1965); *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

The Tenth Circuit Opinion is not only irreconcilably inconsistent with these principles, but also is condemned for its failure to consider the long-standing and undisputed reliance on the unwaivering agency practice by Mountain Bell and at least fifty-nine other grantees of rights-of-way in affirming the District Court's grant of summary judgment. *Minnesota Co. v. National Co.*, 3 Wall. 332 (1865); *and United States v. Title Insurance &*

Trust Co., 265 U.S. 472, 486-487 (1924); *see also Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-458 (1978); *McLaren v. Fleischer*, 256 U.S. 477, 481 (1921). Certiorari should be granted to restore those grantees to the rights they were intended to obtain under the Act.

II. The Opinion Below, In Holding That A Consent Decree Entered In A Pueblo Lands Act Quiet Title Suit Is Not A Final Judgment For Purposes Of Res Judicata Decides An Important Question Of Federal Law In A Manner Which Conflicts With Decisions Of This Court And Of Other Circuits.

This Court's decision in *Nevada v. United States*, — U.S. —, 103 S.Ct. 2906 (1983), ("*Nevada*") confirms that a consent decree based upon an agreement of the parties to the controversy should be given *res judicata* effect, particularly where that prior decree entered decades ago resolves property rights. 103 S.Ct. at 2918, n. 10. *See also, Arizona v. California*, 460 U.S. 605, 103 S.Ct. 1382, 1392 (1983); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486-487 (1924). Principles underlying quiet title decrees, this Court concluded, become "rules of property" and are "distinctly equipped to serve [the policies of *res judicata*] . . . ." 103 S.Ct. at 2918, n. 10.

The record in this case establishes that the Order in *United States v. Brown*, No. 1814 in Equity (D.N.M. May 31, 1928), dismissing Mountain Bell as a party, was the result of an express agreement between the attorney representing the Pueblo and Mountain Bell counsel. (Rec., Supp. Vol. I, 1-9.) In partial compliance with that agreement, and as a condition of dismissal, Mountain Bell obtained Secretarial approval in accordance with Section 17 for the conveyance which it had obtained from the Pueblo. (Rec., Supp. Vol. I, 5.) In consideration of that compliance, the United States dismissed the quiet title suit as against Mountain Bell.

The Tenth Circuit Opinion does not refute that the 1928 action concerned the same property, the same claims, and the same parties as does the Pueblo's present action. Nor does that Court dispute that the 1928 Order of Dismissal embodies the parties' contractual agreement that when Mountain Bell satisfied conditions imposed by the United States, claims by the United States on behalf of the Pueblo would be dismissed, and Mountain Bell's rights would be secured. Instead, contrary to the principles established in *Nevada*, the Court below rested its holding on its observation that the consent decree did not state that the agreed to dismissal was "with prejudice" (App. A at 11-12), and did not constitute a final judgment. (App. A at 11.)

Just as in the quiet title suit adjudicating water rights in *Nevada*, the dispute resolution policies underlying the Pueblo Lands Act require that the 1928 Order of Dismissal be accorded *res judicata* effect. Suits brought under that Act were to be all-encompassing, initiated by a "bill or bills of complaint with a prayer for discovery of the nature of any claim or claims of any kind whatsoever adverse to the claim of said Pueblo Indians . . . ." (App. D at 25.) The consensual dismissal of Mountain Bell is reinforced by the Congressional intent that all Pueblo land claims be finally resolved within the procedures prescribed by that Act. Like the action in *Nevada*, the quiet title actions authorized under the Pueblo Lands

Act were "'no garden variety quiet title action[s].'" 103 S.Ct. at 2925. They were "'intended by all concerned, lawyers, litigants and judges, as . . . general all inclusive . . . adjudication suit[s] which sought to adjudicate all rights and claims . . . and required all parties to fully set up their respective . . . claims.'" *Id.* at 2913. Therefore, the Opinion below, in neglecting to consider the policies of finality embodied in the Pueblo Lands Act quiet title suits, irreconcilably conflicts with this Court's opinion in *Nevada.*[13]

The Tenth Circuit Opinion also is in error in suggesting that since the 1927 lawsuit was not dismissed "with prejudice," it was not entitled to *res judicata* effect (App. A at 12), despite the clear intentions of the parties that the dismissal resolve the underlying dispute. That conclusion conflicts with the Seventh Circuit decision in *Brunswick Corp. v. Chrysler Corp.*, 408 F.2d 335, 337 (7th Cir. 1979). Unlike the instant case, where no reference at all was made to "prejudice," in *Brunswick* the court specifically granted the dismissal "without prejudice." The Seventh Circuit refused to hold that such language precluded *res judicata* effect because to do so would "nullif[y] the clear meaning" of the parties' agreement to settle claims concerning the validity and infringement of a patent embodied in the consensual dismissal. *Id.* at 338. Other Seventh Circuit cases demonstrate a similar commitment to effectuating parties' agreements by giving *res judicata* effect to consent decrees. *See American Equip-*

13. Even the Pueblos' representative at the Pueblo Lands Act hearings was aware that a decree in one of these actions would have a *res judicata* effect. 1923 Senate Hearings, 242.

ment Corp. v. Wikomi Manufacturing Co., 630 F.2d 544 (7th Cir. 1980); *Martino v. McDonald's System, Inc.*, 598 F.2d 1079 (7th Cir.), *cert. denied*, 455 U.S. 966 (1979).

The Tenth Circuit Opinion further holds that because the court never ruled on the validity of Mountain Bell's right-of-way, that the Order of Dismissal has no *res judicata* effect. This is contrary to Second Circuit holdings, which are squarely based on decisions of this Court. *Stuyvesant Insurance Co. v. Dean Construction Co.*, 254 F. Supp. 102, 111 (S.D.N.Y. 1966), *aff'd. sub nom, Stuyvesant Co. v. Kelly*, 382 F.2d 991 (2d Cir. 1967), holds that *res judicata* operates, assuming a final judgment, "regardless of whether all grounds for recovery or defenses were judicially determined," and whether or not the parties' assessment of their legal positions was accurate.

The Tenth Circuit opinion also is falsely premised on its contention that the decree had no binding effect if the earlier judgment was based on an erroneous application of law or if the right sought to be enforced would have been void, citing only *National Life & Accident Ins. Co. v. Parkinson*, 136 F.2d 506 (10th Cir. 1943) (App. at 12). That case plainly rested on the ground that the statute vesting jurisdiction in the court in which the consent decree was entered was void, not on the invalidity of any right asserted in the underlying action. There is, of course, no contention that the Pueblo Lands Act was void to the extent it vested Federal equity courts with jurisdiction over suits under the Act. The *National Life* case is further inapplicable because a consent decree binds the parties even if the legal principles on which one of the parties relied was never actually passed upon or was later determined

to be erroneous. *Angel v. Bullington*, 330 U.S. 183, 190 (1947); *Stuyvesant Insurance Co. v. Dean Construction Co., supra*, 254 F.Supp. at 111.

The consent decree binds the Pueblo without regard to the validity of the right-of-way. *See Heckman v. United States*, 224 U.S. 413, 434-435 (1912). Certiorari should be granted to correct this unwarranted divergence from the principle of finality of judgments.

—o—

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari be issued to review the Judgment and the Opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted this 13th day of August, 1984.

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5-14-83 83-1220

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 83-1220

PUEBLO OF SANTA ANA,

Plaintiff-Appellee,

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY

Defendent-Appellant.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Amicus Curiae

PUEBLO DE ACOMA,

Amicus Curiae

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Amicus Curiae

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. 80-841-M Civ.)

(Filed May 14, 1984)

Scott E. Borg of Luebben & Hughes, Albuquerque, New Mexico, for Plaintiff-Appellee.

Kathryn Marie Krause, Denver, Colorado (Stuart S. Gunckel, Denver, Colorado, with her on the brief) for Defendant-Appellant.

Gary Crosby, Santa Fe Industries, Inc., Chicago, Illinois and John R. Cooney, Lynn H. Slade, John S. Thal and Walter E. Stern, III of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, filed briefs on behalf of Amicus Curiae The Atchison, Topeka & Santa Fe Railway Company. Public Service Company of New Mexico joined in the Amicus Briefs of The Atchison, Topeka & Santa Fe Railway Company.

Arturo G. Ortega of Ortega & Snead, P.A., Albuquerque, New Mexico and Peter C. Chestnut of Albuquerque, New Mexico, filed a brief on behalf of Amicus Curiae of Pueblo de Acoma.

Before McWILLIAMS BREITENSTEIN and LOGAN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is an interlocutory appeal from the United States District Court for the District of New Mexico which we permitted to be filed. The court granted partial sum-

mary judgment to the plaintiff-appellee, Pueblo of Santa Ana, and against the defendant-appellant, Mountain States Telephone and Telegraph Company, Mountain Bell. The dispute involves a right of way for a telephone and telegraph line across Pueblo lands. The trial court held in favor of the Pueblo and Mountain Bell appeals. We affirm.

The Pueblo was the owner of a tract of land situated in New Mexico which was a part of the El Ranchito Grant. In November, 1927, the United States pursuant to the Pueblo Lands Act, 43 Stat. 636, filed an action in the federal district court for the district of New Mexico entitled United States as Guardian of the Pueblo of Santa Ana v. Brown, No. 1814 Equity (D.N.M. 1928), seeking to quiet title to this tract in the Pueblo. Mountain Bell was party to that suit. During the course of that litigation, the Pueblo entered into a right-of-way agreement with Mountain Bell, dated February 23, 1928, granting an easement to construct, maintain, and operate a telephone and telegraph line, the same line that is in controversy here. Acting pursuant to § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636, 641-642, the Secretary of the Interior approved the agreement. The United States then moved to have Mountain Bell dismissed from the action on the ground that it had obtained title to the right of way through the easement agreement. In granting this motion, the court noted that it appeared "that since the institution of this suit said defendant has secured good and sufficient title to the right of way and premises in controversy. . . ."

In the present action Mountain Bell argues that it obtained a valid right of way across the Pueblo's land in 1928 and under § 17 of the Pueblo Lands Act of June 7,

1924, 43 Stat. 636. It argues further that the Pueblo's claims are barred by the 1928 dismissal of the case involving the same parties and issues. On these grounds, Mountain Bell moved for summary judgment that no trespass existed from 1928 to the present. The district court held, however, that § 17 did not authorize conveyance of lands by the Pueblo with the approval of the Secretary. The district court accepted the Pueblo's argument that § 17 was intended as a prohibition against the alienation of Pueblo lands except as Congress may provide in the future. Its requirements of Congressional authorization and Secretarial approval paralleled and were intended to extend to the Pueblo the Nonintercourse Act's requirement of a treaty or convention entered into pursuant to the Constitution. See Acts of June 30, 1834, 4 Stat. 729, 730 § 12 (codified at 25 U.S.C. § 177), and February 27, 1851, 9 Stat. 574, 587 § 7. The court further held that the Pueblo's claims were not barred by the 1928 dismissal order because that order did not constitute a final judgment.

Section 17 of the Pueblo Lands Act provides:

> "No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, *or in any other manner except as may hereafter be provided by Congress, and* no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity *unless the same be first approved by the Secretary of the Interior.*" [Emphasis supplied.]

Mountain Bell challenges the argument of the Pueblo, upheld by the trial court, that § 17 was intended as an extension to the Pueblos of the Nonintercourse Act, in prohibiting alienation of Pueblo lands except as Congress may provide in the future and as approved by the Secretary. Mountain Bell argues that the first clause of § 17 requires Congressional approval for condemnations and other similar takings of Pueblo lands and that the second clause authorizes a pueblo to alienate its lands if it obtains Secretarial approval. Analysis of these arguments requires an examination of the language, the historical background, the legislative history, and the administrative history of the Act.

The Nonintercourse Act required a treaty or convention to alienate Indian lands, Act of June 30, 1834, 4 Stat. 729, 730 § 12 (codified at 25 U.S.C. § 177). The Act of February 27, 1851, 9 Stat. 574, 587 § 7, extended all laws then in force regulating trade and intercourse with the Indian tribes to include Indian tribes in the Territory of New Mexico.

In State of New Mexico v. Aamodt, 10 Cir., 537 F.2d 1102, cert. denied 429 U.S. 1121, a water rights case, we reviewed the historical background of the controversy, pp. 1105 and 1109, and pointed out, p. 1105, that the efforts of federal officials to protect the Pueblos' property were frustrated by the New Mexico territorial courts which held that the Pueblos were outside the protection of federal laws. This rationale was upheld by the Supreme Court in United States v. Joseph, 94 U.S. 614.

We noted, at p. 1105, that the 1910 New Mexico Enabling Act, 36 Stat. 557, 558-559, defined "Indian country"

to include "all lands now owned or occupied by the Pueblo Indians" and stated that such lands are "under the absolute jurisdiction and control of the Congress of the United States." The constitutionality of this provision was upheld in United States v. Sandoval, 231 U.S. 28, which specifically overruled United States v. Joseph. The Court said, Id. at 39, that,

> "The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government."

The Court noted that the United States has treated the pueblos "as requiring special consideration and protection, like other Indian communities." Id.

Because in the *Joseph* decision the Supreme Court decided that the Pueblo lands were not subject to the protective laws earlier passed by Congress, non-Indians were free to acquire Pueblo lands. The validity of titles so acquired became questionable when in Sandoval the Court held that the protective federal statutes did apply and presumably always had applied. Congress responded with the passage in 1924 of the Pueblo Lands Act, 43 Stat. 636. The Act established a "Pueblo Lands Board" to investigate the Pueblo lands and determine those cases in which the Indian title should be extinguished. The United States as guardian of the Pueblos was required to institute quiet title actions to settle adverse claims to Pueblo lands. Non-Indians claiming title could plead adverse possession and the statute of limitations, defenses not ordinarily available against the United States.

In 1926, the Court in United States v. Candelaria, 271 U.S. 432, reaffirmed Sandoval. In so doing, it said after referring to the 1834 and 1851 acts, p. 441:

> "While there is no express reference in the provision to the Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, 'any tribe of Indians.'"

We echoed this language, noting the application of the Nonintercourse Act to the Pueblo Indians in Aamodt, supra. In Plains Elec. Gen. & Tr. Co-op v. Pueblo of Laguna, 10 Cir., 542 F.2d 1375, 1376, we cited Candelaria as authority for the statement that "Lands of the Pueblos cannot be alienated without the consent of the United States." In United States v. University of New Mexico, No. 83-1238, 10 Cir. opinion filed April 9, 1984, we noted that Congress extended the Nonintercourse Act to the Pueblos in 1851 and said that § 17 of the Pueblo Lands Act of 1924 "reaffirmed that the Pueblos and their lands were fully under the guardianship of Congress and the protection of the Nonintercourse Act." Slip Op. at 7. In so doing we noted the following statement in United States v. Chavez, 290 U.S. 357, 362:

> "[T]he status of the Indians of the several Pueblos in New Mexico is that of dependent Indian tribes under the guardianship of the United States and that by reason of this status they and their lands are subject to the legislation of Congress enacted for the protection of tribal Indians and their property."

Thus we have three times held that the Pueblo's lands were under the protection of the Nonintercourse Act.

Mountain Bell argues that § 17 was not a grant of power to the Pueblos to convey their lands, but instead re-

affirmed the power of alienation which already existed in the Pueblos, and implemented the government's guardianship role by restricting that power. This view is insupportable. The House Report on the Pueblo Lands Act, reprinting the language of the Senate Report, states:

> "It was only by the decision of the case of the *United States v. Sandoval* (213 U.S. 28) that the Supreme Court of the United States definitely established the principle that these Indians were wards of the Government. . . .
>
> Up to the time of the decision of the *Sandoval* case in 1913, it had been assumed by both the Territorial and State courts of New Mexico, that the Pueblos has [sic] the right to alienate their property. From earliest times also the Pueblos had invited Spaniards and other non-Indians to dwell with them, and in many cases Pueblos and individual Indians attempted to convey lands to non-Indians which under the decision of the Sandoval case they were not competent to do." H.R. Rep. No. 787, 68th Cong. 1st Sess. 2 (1924).

It seems clear, then, that if § 17 is not a delegation of power, the 1928 agreement is void.

The terms of § 17 do not provide such authorization to the pueblos to grant their lands. The two clauses of § 17 of the Pueblo Lands Act are joined by the conjunctive "and." To us that means exactly what it says. No alienation of the Pueblo lands shall be made "except as may hereafter be provided by Congress" *and* no such conveyance "shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior." Two things are required. First, the lands must be conveyed in a manner provided by Congress. Second, the Secretary of the Interior must approve. As to the first,

at the time of the agreement between the Pueblo and Mountain Bell, Congress had provided nothing. Hence, the first condition was not met. The fact that Congress had provided no method makes the approval of the Secretary meaningless. The operation of the second clause depends on compliance with the first clause.

Mountain Bell argues that to give the first clause the meaning which we have approved runs contrary to 25 U.S.C. §§ 311-322 providing among other things for rights of way for telephone and telegraph lines. The answer is that Congress did not extend the application of these statutes to the Pueblo Indians of New Mexico until the Act of April 21, 1928, see 25 U.S.C. § 322, which was after the Secretary had given his approval to the agreement, with Mountain Bell. The Secretary's approval, given on April 13, 1928 says that it was done pursuant to the provisions of § 17 of the Act of June 7, 1924.

Mountain Bell makes much of the legislative history of the Pueblo Lands Act. We have examined the Senate and House reports of the hearings. Hearings before a subcommittee of the Committee on Public Lands and Surveys, on S. 3865 and 4223, 67th Cong. 4th Session; Hearings before the Committee on Indian Affairs on H.R. 13452 and H.R. 13674, 67th Cong. 4th Session. We find that the most that can be said about them is that they are ambiguous and add nothing to the express language of the statute. If it be conceded that the statute is ambiguous, and we do not feel that it is, then as said in Bryan v. Itasca County, 426 U.S. 373, 392:

> ". . . we must be guided by that 'eminently sound and vital canon,' *Northern Cheyenne Tribe v. Hollowbreast* 425 U.S. 649, 655 n. 7 (1976), that 'statutes passed for the benefit of dependent Indian tribes . . .

> are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'"

See also United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 354.

Mountain Bell says that the administrative construction of the statute supports its contentions. Although the construction put on a statute by the agency charged with administering it is entitled to deference, the courts are the final authorities on statutory construction and are not obliged to accept an administrative construction which they deem inconsistent with a statutory mandate or frustrates congressional policy. SEC v. Sloan, 436 U.S. 103, 117-118; and FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745-746. See also Plateau, Inc. v. Dept. of Interior, 10 Cir., 603 F.2d 161, 164. In our opinion, the administrative actions on which Mountain Bell relies violate the plain congressional intent of § 17 of the Pueblo Lands Act.

Mountain Bell argues that the Pueblo's claim is barred by the doctrines of res judicata and collateral estoppel because of the dismissal of Mountain Bell as a defendant in United States v. Brown, supra, No. 1814 Equity (D.N.M. 1928). The Brown suit was filed in November of 1927, under the Pueblo Lands Act of June 7, 1924. Mountain Bell neither entered an appearance in the case nor filed an answer. On April 13, 1928, the Assistant Secretary of the Interior approved an agreement between the Pueblo and Mountain Bell for a telephone lines easement across the Pueblo lands. The approval reads "APPROVED, pursuant to the provisions of Section 17 of the Act of June 7, 1924 (43 Stat. L. 636)."

The United States then filed a motion in the Brown case asking the dismissal of Mountain Bell and, as ground for the motion it alleged that,

> "subsequent to the institution of this suit said defendant has obtained a deed from the Pueblo of Santa Ana approved April 13, 1928, by the Secretary of the Interior in accordance with Section 17 of the Pueblo Lands Act of June 7, 1924, and that thereby said defendant has obtained, for an adequate consideration, good and sufficient title to the right of way in controversy herein between plaintiff and said defendant."

In its order granting the motion the trial court echoed the language of the motion. It failed to state whether it was with or without prejudice and it was, therefore without prejudice. See Ex Parte Skinner and Eddy Corp., 265 U.S. 86. Home Owners' Loan Corp. v. Huffman, 8 Cir., 134 F.2d 314, 317, says that Rule 41 Fed.R.Civ.P., which adopted this standard, followed long established practice in federal courts and is intended to clarify and make definite that practice.

Mountain Bell argues that the three requirements for application of res judicata or collateral estoppel are (1) identity of causes of action, (2) identity of the parties or privity, and (3) a final judgment in the first suit. Only the third need be considered. Mountain Bell says that a voluntary dismissal may be a final judgment for res judicata purposes if it addresses and resolves the issue originally in dispute. In making this argument, Mountain Bell relies largely on cases wherein a consent decree was issued. A consent judgment may assume any of several forms. When entered as a decree of dismissal with prejudice, the judgment is generally preclusive. See Bradford v. Bonner, 5 Cir., 665 F.2d 680, 682 and Bloomer

Shippers Ass'n v. Illinois Central Gulf Railroad Co., 7 Cir., 655 F.2d 772, 777.

The dismissal order in Brown indicates neither the court's consideration nor approval of the agreement. The court said only that it appeared to the court that the defendant had secured good and sufficient title by a deed from the Pueblo approved by the Secretary of the Interior "in accordance with the provisions of Section 17 of the Pueblo Lands Act of June 7, 1924." There is no showing that the court was given a copy of the agreement. There were no findings of fact or conclusions of law.

In National Life & Accident Insurance Co. v. Parkinson, 10 Cir., 136 F.2d 506, 509, we said:

> "Courts do not validate that which is invalid by merely consenting to a dismissal of the controversy over which its jurisdiction has been invoked."

We have held that the agreement is invalid under § 17 in the absence of congressional action. Mountain Bell would have us hold that the agreement was valid under the action of the district court in dismissing the case without prejudice and making no effort to decide the validity of the agreement. We reject the arguments of res judicata and collateral estoppel.

Pursuant to Rule 56, Fed.R.Civ.P., Mountain Bell moved for a partial summary judgment dismissing the plaintiff's claims for trespass for the period 1928 to date alleging that it is not a trespasser by reason of the April 13, 1928, approval of the Secretary of the Interior. The trial court denied the motion saying, I P. p. 143:

> "The Pueblo shall recover damages from April 13, 1928 to the date the defendant's telephone and tele-

> graph line was removed. Plaintiff's prayer for punitive damages is denied."

As the Pueblo points out, the commentators generally agree that where there is no genuine issue of fact, the court may enter summary judgment for either party, whether or not such party has made a motion therefor. See 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2720, at 29-30, "the weight of authority is that summary judgment may be rendered in favor of the opposing party even though he has made no formal cross-motion under Rule 56."

Mountain Bell's motion does not address the claimed trespass prior to 1928, and hence the plaintiff's claim for damages for the period prior to 1928 remains at issue.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-841-M Civil

PUEBLO OF SANTA ANA,

Plaintiff,

vs.

MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,

Defendant.

MEMORANDUM OPINION
AND
ORDER

(Filed June 2, 1982)

This matter arises on cross motions for summary judgment by defendant, Mountain States Telephone and Telegraph Co., (Telephone) and plaintiff Pueblo of Santa Ana (Pueblo). The parties agree and I find that there are no material issues of fact as to the issues presented. The plaintiff is entitled to judgment as a matter of law as to those issues.

The Pueblo seeks damages from the defendant for a trespass which began in 1907 and has continued to the present. The trespass is a telephone and telegraph line constructed by defendant's predecessor across lands held by the Pueblo in fee simple but subject to federal restraints against alienation. Telephone argues it obtained a valid right of way across the Pueblo's land in 1928 pur-

suant to § 17 of the Pueblo Lands Act of June 7, 1924. 43 Stat. 636. Telephone also argues plaintiff's claims are barred by the judgment in *United States as Guardian of the Pueblo of Santa Ana v. Brown,* No. 1814 Equity (D.N.M. 1928). The issues presented are: (1) Did Congress, in § 17 of the Pueblo Lands Act, intend to grant to the Pueblos of New Mexico authority to alienate their land? (2) Are Santa Ana's claims barred by the judgment in *U.S. v. Brown?*

THE PUEBLO LANDS ACT

Section 17 of the Pueblo Lands Act provides:

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as herein before determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity and unless the [sic] be first approved by the Secretary of Interior.

It is not disputed that the Secretary, on April 12, 1928, approved the right of way granted to Telephone by the Pueblo. Pueblo argues, however, that Telephone could not obtain a valid right of way pursuant to § 17 because § 17 was an extension of the Indian Non-Intercourse Act to the Pueblos of New Mexico, and not a grant of authority to the Pueblos and the Secretary to alienate Pueblo lands. Pueblo maintains § 17's prohibition against the alienation of Pueblo lands except as Congress may provide in the future and its requirement of Secretarial approval closely parallels and was intended to extend to the Pueblos the

Non-Intercourse Act's requirement of a treaty or convention negotiated by an officer of the United States to alienate Indian lands. Acts of June 30, 1834, 4 Stat. 730 § 12, (codified at 25 U.S.C. 177), and February 27, 1851, 9 Stat. 587. Telephone argues the first clause of § 17 refers to condemnation or other similar takings which Congress may authorize in the future and the second clause was intended by Congress to allow grants of Pueblo lands by the Pueblos so long as the approval of the Secretary was first obtained. A brief discussion of the circumstances surrounding the enactment of the Pueblo Lands Act is necessary to an understanding of the issue.

The Pueblo Lands Act was a congressional response to the confusion created by the Supreme Court's conflicting decisions in *U.S. v. Joseph,* 94 U.S. 614 (1876); *U.S. v. Sandoval,* 231 U.S. 28 (1913); and *U.S. v. Candelaria,* 271 U.S. 432 (1925). In *Joseph,* the issue was whether the Pueblos of the Rio Grande Valley of New Mexico were afforded protections under the Indian Non-Intercourse Acts. Acts of June 30, 1834, 4 Stat. 730, § 12 and February 27, 1851, 9 Stat. 587. The Act of June 30, 1834, among other things, forbade the transfer of Indian lands unless the grant "be made by treaty or convention entered into pursuant to the Constitution." Section 12 also requires that the treaty or convention be negotiated by an officer of the United States. The Act of February 27, 1851 extended the protections of the June 30, 1834 Act to the Indian Tribes of the newly acquired Territory of New Mexico. However, the Court in *Joseph* held the Acts did not apply to the Pueblos of New Mexico because, unlike other Indian Tribes, Pueblo land was owned in fee simple and also because the Pueblo Indians were sophisticated such that federal protections were not required. After

the decision in *Joseph,* the United States made no effort to prevent encroachment on Pueblo lands.

However, the Court again had the opportunity to consider the status of the Pueblos in *Sandoval* and *Candelaria.* In *Sandoval* the Court held that the Pueblo Indians were ethnically and historically "Indians" and that Congress had the power to define them as such in the New Mexico Statehood Enabling Act of June 20, 1910. 36 Stat. 557. In *Candelaria,* a quiet title action, the Court was again presented with the question of the applicability of the Indian Non-Intercourse Acts to the Pueblos. Acts of June 30, 1834 and February 27, 1851. In holding that the Pueblos were afforded the protections of the Non-Intercourse Acts, the Court stated,

> While there is no express reference in the provision (the provision prohibitting (sic) settlement on Indian Lands in the Act of 1834) to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, 'any tribe of Indians.' Although sedentary, industrious and disposed to peace, they are Indians in race, custom and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of others." 271 U.S. at 442.

The decision in *Candelaria* created uncertainty in New Mexico for those who had settled on Pueblo lands between the time of the decisions in *Joseph* and *Candelaria.* In *Candelaria,* the Court held that the Pueblos were protected by the Non-Intercourse Acts and had been since the Acts were extended to the Pueblos of New Mexico in 1851. Therefore, those who had settled on Pueblo lands in good faith since 1851, were in violation of the Non-Intercourse Acts. The Pueblo Lands Act was Congress' response to this dilemma.

The Act created the Pueblo Lands Board and charged it with the responsibility of investigating title to Pueblo lands and filing actions in Federal District Court to recover certain lands of the Pueblos. Section 3. Other Pueblo lands, where the settlers could establish title under state or territorial law or where they could comply with the statute of limitations contained in Section 4 of the Pueblo Lands Act, were to be awarded to the settlers. Section 5. The Pueblos were to be compensated for property lost to the non-Indian settlers. Section 6.

In the Pueblo Lands Act, Congress was attempting to work an equitable solution to the thorny problem created by uncertainty as to the status of the Pueblo Indians. I am convinced that Congress was also, in § 17, reaffirming through congressional enactment what the Supreme Court decided in *Candelaria:* The Pueblos are Indians and wards of the federal government and Congress intended they be afforded the protections of the Indian Non-Intercourse Acts.

The Tenth Circuit reached a similar conclusion in *Plains Elec. Gen. and Tr. Co-Op v. Pueblo of Laguna,* 542 F.2d 1375, 1381 (10th Cir. 1976). In *Plains,* the issue was whether Congress had repealed, by implication, a general Pueblo land condemnation statute by its subsequent enactment of a specific, comprehensive scheme for the acquisition of rights of way across Pueblo lands. In holding there had been a repeal, the Court stated,

> The history of these statutes (26 U.S.C. §§ 311-328; statutes providing for the acquisition of rights of way across Pueblo lands) reflects an effort to overcome the problems caused by the unique nature of Pueblo Indian land holdings and to provide them with the same protections given the lands of other Indians. The United States Supreme Court has held that Pueblo lands are subject to such protection, *United States v. Candelaria,* [271 U.S. 432 (1925)] and *United States v. Sandoval,* [231 U.S. 28 (1913)], and the intent of Congress to provide such protection cannot be doubted.

Accordingly, I will determine whether Congress intended § 17 to grant to the Pueblos authority to alienate their lands with Secretarial approval, by determining whether such a grant of authority is consistent with the Indian Non-Intercourse Acts, and federal Indian policy generally.

The Constitution rests the power to deal with Indian tribes in the Congress. Included in that power is the exclusive right to extinguish Indian titles. Act of June 30, 1834, 4 Stat. 730; *U.S. v. Santa Fe Pacific Rlwy Co.,* 314 U.S. 339, 347 (1941). Congress' intent to authorize alienation of Indian lands must be clear and express. *Chippewa v. U.S.,* 307 U.S. 1 (1939). Doubtful expressions of congressional intent to authorize alienation of Indian land must be resolved in favor "[of the Indian . . . who is] wholly dependent on its [the federal government's] protection and good faith." *U.S. v. Santa Fe Pacific Rlwy Co.,* at 354. Although Congress may delegate its power, the unilateral action of an officer of the Executive Branch cannot alienate land. Whether Congress intended to delegate its authority to alienate Indian lands must be determined against the "strong background of maintenance of congressional control." *Turtle Mountain Band of Chippewa Indians v. U.S.,* 490 F.2d 935, 946 (Ct. Claims 1974).

By the terms of § 17 of the Pueblo Lands Act, there is no authorization for the grant or sale of Pueblo lands. Although such authorization might be inferred from the Section's requirement of Secretarial approval, I decline to do so. The claimed authorization is not clear and ex-

press. Furthermore, it would be anomalous to conclude that Congress, having expressed its intention to afford the Pueblos the protection of other Indians, abondoned its objective and completely delegated its authority to the Secretary, with no restrictions, unlike other Indian Tribes. Such irrationality and arbitrariness should not be attributed to the Congress that was attempting to solve the problems created by the Supreme Court's erroneous decision in *Joseph. See Morton v. Mancari,* 417 U.S. 535, 548 (1974).

The construction of § 17 offered by the Pueblo is certainly more reasonable. The Secretary has adopted the construction offered by the Pueblo. 25 C.F.R. 121.22 provides:

> Tribal Lands. Lands held in trust by the United States for an Indian Tribe. Lands owned by a tribe with federal restrictions against alienation and any other land owned by an Indian Tribe may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the act of Congress authorizing sale provides that approval is unnecessary. (See 25 U.S.C. 177 [Act of June 30, 1834]).

Although the Secretary has not always construed the Act of June 30, 1834 and § 17 of the Pueblo Lands Act to require congressional authorization (apart from § 17) and the approval of the Secretary, as evidenced by the Secretary's approval of the right of way at issue in this case, the Secretary's differing constructions of § 17 illustrates my conclusion that § 17 was not a clear and express grant of authority to the Secretary and the Pueblos to alienate Pueblo lands.

RES JUDICATA AND COLLATERAL ESTOPPEL

Telephone also argues Pueblo's claim from 1928 to the present is barred by the judgment in *U.S. v. Brown,* No. 1814 Equity (D.N.M. 1928). *Brown* was brought by the United States as guardian of the Pueblo pursuant to § 4 of the Pueblo Lands Act to quiet title to Santa Ana Pueblo lands. In the course of the suit, before Telephone filed its answer, the United States moved to dismiss Telephone on the ground that Telephone had obtained a valid right of way, the right of way at issue here. Dismissal was ordered the day the motion was filed and the order of dismissal did not state whether the dismissal was with or without prejudice. The dismissal is, therefore, without prejudice. Fed.R.Civ.P. 41; *Homeowners' Loan Corp. v. Huffman,* 134 F.2d 314, 317 (8th Cir. 1943).

Telephone argues that Pueblo's claims from 1928 are *res judicata* and that the Pueblo is collaterally estopped from relitigating the validity of the right of way at issue in this case. A final judgment on the merits is essential in order for an action to be *res judicata.* For collateral estoppel to apply, the factual issue must have been actually litigated and necessarily decided. Wright, Miller and Cooper, *Federal Practice and Procedure:* Jurisdiction § 4406 at p. 45; *Craft v. Choate,* No. 81-1893 (10th Cir. Slip Opinion, April 5, 1982). There was no judgment on the merits in *Brown* and the validity of Telephone's right of way was not actually litigated or necessarily decided.

Telephone concedes that it was dismissed from the suit on the pretrial motion of the United States, but it maintains that the dismissal should be afforded the status of a judgment on the merits because of the Court's obser-

vation in the order of dismissal that "it appear[ed] to the court that since the institution of this suit, said defendant has secured good and sufficient title to the right of way and premises in controversy herein between plaintiff and said defendant by deed from the Pueblo of Santa Ana approved April 13, 1928 by the Secretary of Interior in accordance with the provisions of § 17 of the Pueblo Lands Act of June 7, 1924."

I am not convinced that the court's observation as to the reasons the United States moved for dismissal should elevate the order of dismissal to the status of an order on the merits. Substance must govern over form. The order of dismissal in *Brown* was not an order on the merits and the issue of the validity of Telephone's right of way was not actually litigated and necessarily decided. It is not uncommon for a court to state in its order of dismissal the reason plaintiff moved for the dismissal. Plaintiff's claims are not *res judicata* and the factual issues present in those claims are not precluded by collateral estoppel.

In conclusion, § 17 of the Pueblo Lands Act was intended by Congress to reaffirm the protections afforded the Pueblos under the Acts of June 30, 1834 and February 27, 1851. It was not intended to grant to the Pueblos and the Secretary *carte blanc* to alienate Pueblo lands for any reason. Plaintiffs claims are not barred by the judgment in *U.S. v. Brown*. The Pueblo shall recover damages from April 13, 1928 to the date the defendant's telephone and telegraph line was removed. Plaintiff's prayer for punitive damages is denied.

/s/ E. L. Mechem
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-841-M Civil

PUEBLO OF SANTA ANA,
Plaintiff,

vs.

MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,
Defendant.

ORDER

(Filed July 13, 1982)

This matter arises for consideration on defendant's motion to certify an interlocutory appeal of my order of June 2, 1982, pursuant to 28 U.S.C. 1292(b) (1976). Having considered the motion and being otherwise advised in the premises, I find that the issue determined in that order involves a controlling question of law as to which there is substantial ground for difference of opinion. I further find that an immediate appeal may materially advance the ultimate termination of the litigation. Now, Therefore,

IT IS ORDERED that defendant is hereby granted an interlocutory appeal from my order of June 2, 1982 pursuant to 28 U.S.C. 1292(b) (1976).

/s/ E. L. Mechem
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

Tenth Circuit
Office of the Clerk
C404 United States Courthouse
Denver, Colorado 80294

Howard K. Phillips
Clerk

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May 14, 1984

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Re: 83-1220, Pueblo of Santa Ana vs. Mountain States Telephone and Telegraph, et al

Dear Counsel:

Enclosed is a copy of the opinion of the Court in the captioned cause. Judgment in accordance with the opinion has been entered today.

Sincerely yours,

/s/ Howard K. Phillips, Clerk

HKP/mju
enc.

APPENDIX D

Act June 7, 1924, c. 331, 43 Stat. 636, as amended by Act May 31, 1933, c. 45, § 7, 48 Stat. 111, provided:

"1. That in order to quiet title to various lots, parcels, and tracts of land in the State of New Mexico for which claim shall be made by or on behalf of the Pueblo Indians of said State as hereinafter provided, the United States of America, in its sovereign capacity as guardian of said Pueblo Indians shall, by its Attorney General, file in the District Court of the United States for the District of New Mexico, its bill or bills of complaint with a prayer for discovery of the nature of any claim or claims of any kind whatsoever adverse to the claim of said Pueblo Indians, as hereinafter determined.

"2. That there shall be, and hereby is, established a board to be known as 'Pueblo Lands Board' to consist of the Secretary of the Interior, the Attorney General, each of whom may act through an assistant in all hearings, investigations, and deliberations in New Mexico, and a third member to be appointed by the President of the United States. The board shall be provided with suitable quarters in the city of Santa Fe, New Mexico, and shall have power to require the presence of witnesses and the production of documents by subpoena, to employ a clerk who shall be empowered to administer oaths and take acknowledgments, shall employ such clerical assistance, interpreters, and stenographers with such compensation as the Attorney General shall deem adequate, and it shall be provided with such necessary supplies and equipment as it may require on requisitions to the Department of Justice. The compensation and allowance for travel and expenses of the

member appointed by the President shall be fixed by the Attorney General.

"It shall be the duty of said board to investigate, determine, and report and set forth by metes and bounds, illustrated where necessary by field notes and plats, the lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States of America, or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise, title to which the said board shall find not to have been extinguished in accordance with the provisions of this Act, and the board shall not include in their report any claims of non-Indian claimants who, in the opinion of said board after investigation, hold and occupy such claims of which they have had adverse possession, in accordance with the provisions of section 4 of this Act: Provided, however, That the board shall be unanimous in all decisions whereby it shall be determined that the Indian title has been extinguished.

"The board shall report upon each pueblo as a separate unit and upon the completion of each report one copy shall be filed with the United States District Court for the District of New Mexico, one with the Attorney General of the United States, one with the Secretary of the Interior, and one with the Board of Indian Commissioners.

"3. That upon the filing of each report by the said board, the Attorney General shall forthwith cause to be filed in the United States District Court for the District of New Mexico, as provided in section 1 of this Act, a suit to quiet title to the lands described in said report as Indian lands the Indian title to which is determined by said report not to have been extinguished.

"4. That all persons claiming title to, or ownership of, any lands involved in any such suit, or suits, may in addition to any other legal or equitable defenses which they may have or have had under the laws of the Territory and State of New Mexico, plead limitation of action, as follows, to wit:

"(a) That in themselves, their ancestors, grantors, privies, or predecessors in interest or claim of interest, they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed, under color of title from the 6th day of January, 1902, to the date of the passage of this Act [June 7, 1924], and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation, or adverse possession of the Territory or of the State of New Mexico, since the 6th day of January, 1902, to the date of the passage of this Act [June 7, 1924], except where the claimant was exempted or entitled to be exempted from such tax payment.

"(b) That in themselves, their ancestors, grantors, privies, or predecessors in interest or claim of interest, they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed with claim of ownership, but without color of title from the 16th day of March, 1889, to the date of the passage of this Act [June 7, 1924], and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation or adverse possession of the Territory or of the State of New Mexico, from the 16th day of March, 1899, to the date of the passage of this Act [June 7, 1924], except where the claimant was exempted or entitled to be exempted from such tax payment.

"Nothing in this Act contained shall be construed to impair or destroy any existing right of the Pueblo Indians of New Mexico to assert and maintain unaffected by the provisions of this Act their title and right to any land by original proceedings, either in law or equity, in any court of competent jurisdiction and any such right may be asserted at any time prior to the filing of the field notes and plats as provided in section 13 hereof, and jurisdiction with respect to any such original proceedings is hereby conferred upon the United States District Court for the District of New Mexico with right of review as in other cases: Provided, however, That any contract entered into with any attorney or attorneys by the Pueblo Indians of New Mexico, to carry on such litigation shall be subject to and in accordance with existing laws of the United States.

"5. The plea of such limitations, successfully maintained, shall entitle the claimants so pleading to a decree in favor of them, their heirs, executors, successors, and assigns for the premises so claimed by them, respectively, or so much thereof as may be established, which shall have the effect of a deed of quit-claim as against the United States and said Indians, and a decree in favor of claimants upon any other ground shall have a like effect.

"The United States may plead in favor of the pueblo, or any individual Indian thereof, as the case might be, the said limitations hereinbefore defined.

"6. It shall be the further duty of the board to separately report in respect of each such pueblo—

"(a) The area and character of any tract or tracts of land within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico and the

extent, source, and character of any water right appurtenant thereto in possession of non-Indian claimants at the time of filing such report, which are not claimed for said Indians by any report of the board.

"(b) Whether or not such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians. Seasonable prosecution is defined to mean prosecution by the United States within the same period of time as that within which suits to recover real property could have been brought under the limitation statutes of the Territory and State of New Mexico.

"(c) The fair market value of said water rights and of said tract or tracts of land (exclusive of any improvements made therein or placed thereon by non-Indian claimants) whenever the board shall determine that such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians, and the amount of loss, if any, suffered by said Indians through failure of the United States seasonably to prosecute any such right.

"The United States shall be liable, and the board shall award compensation, to the pueblo within the exterior boundaries of whose lands such tract or tracts of land shall be situated or to which such water rights shall have been appurtenant to the extent of any loss suffered by said Indians through failure of the United States seasonably to prosecute any right of the United States or of said Indians, subject to review as herein provided. Such report and

award shall have the force and effect of a judicial finding and final judgment upon the question and amount of compensation due to the Pueblo Indians from the United States for such losses. Such report shall be filed simultaneously with and in like manner as the reports hereinbefore provided to be made and filed in section 2 of this Act.

"At any time within sixty days after the filing of said report with the United States District Court for the District of New Mexico as herein provided the United States or any pueblo or Indians concerned therein or affected thereby may, in respect of any report upon liability or of any finding of amount or award of compensation set forth in such report, petition said court for judicial review of said report, specifying the portions thereof in which review is desired. Said court shall thereupon have jurisdiction to review, and shall review, such report, finding, or award in like manner as in the case of proceedings in equity. In any such proceeding the report of the board shall be prima facie evidence of the facts, the values, and the liability therein set forth, subject, however, to be rebutted by competent evidence. Any party in interest may offer evidence in support or in opposition to the findings in said report in any respect. Said court shall after hearing render its decision so soon as practicable, confirming, modifying, or rejecting said report or any part thereof. At any time within thirty days after such decision is rendered said court shall, upon petition of any party aggrieved, certify the portions of such report, review of which has been sought, together with the record in connection therewith, to the United States Circuit Court of Appeals for the Eighth Circuit, which shall have jurisdiction to consider, review, and decide all questions arising upon such report

and record in like manner as in the case of appeals in equity, and its decision thereon shall be final.

"Petition for review of any specific finding or award of compensation in any report shall not affect the finality of any findings nor delay the payment of any award set forth in such report, review of which shall not have been so sought, nor in any proceeding for review in any court under the provisions of this section shall costs be awarded against any party.

"7. It shall be the further duty of the board to investigate, ascertain, and report to the Secretary of the Interior who shall report to the Congress of the United States, together with his recommendation, the fair market value of lands, improvements appurtenant thereto, and water rights of non-Indian claimants who, in person or through their predecessors in title prior to January 6, 1912, in good faith and for a valuable consideration purchased and entered upon Indian lands under a claim of right based upon a deed or document purporting to convey title to the land claimed or upon a grant, or license from the governing body of a pueblo to said land, but fail to sustain such claim under the provisions of this Act, together with a statement of the loss in money value thereby suffered by such non-Indian claimants. Any lands lying within the exterior boundaries of the pueblo of Nambe land grant, which were conveyed to any holder or occupant thereof or his predecessor or predecessors in interest by the governing authorities of said pueblo, in writing, prior to January 6, 1912, shall unless found by said board to have been obtained through fraud or deception, be recognized as constituting valid claims by said board and by said courts, and disposed of in such manner as lands the Indian title to which has

been determined to have been extinguished pursuant to the provisions of this Act: Provided, That nothing in this section contained with reference to the said Nambe Pueblo Indians shall be construed as depriving the said Indians of the right to impeach any such deed or conveyance for fraud or to have mistakes therein corrected through a suit in behalf of said pueblo or of an individual Indian under the provisions of this Act.

"8. It shall be the further duty of the board to investigate, ascertain, and report to the Secretary of the Interior the area and the value of the lands and improvements appurtenant thereto of non-Indian claimants within or adjacent to Pueblo Indian settlements or towns in New Mexico, title to which in such non-Indian claimants is valid and indefeasible, said report to include a finding as to the benefit to the Indians in anywise of the removal of such non-Indian claimants by purchase of their lands and improvements and the transfer of the same to the Indians, and the Secretary of the Interior shall report to Congress the facts with his recommendations in the premises.

"9. That all lands, the title to which is determined in said suit or suits, shall, where necessary, be surveyed and mapped under the direction of the Secretary of the Interior, at the expense of the United States, but such survey shall be subject to the approval of the judge of the United States District Court for the District of New Mexico, and if approved by said judge shall be filed in said court and become a part of the decree or decrees entered in said district court.

"10. That necessary costs in all original proceedings under this Act, to be determined by the court, shall be

taxed against the United States and any party aggrieved by any final judgment or decree shall have the right to a review thereof by appeal or writ of error or other process, as in other cases, but upon such appeal being taken each party shall pay his own costs.

"11. That in the sense in which used in this Act the word 'purchase' shall be taken to mean the acquisition of community lands by the Indians other than by grant or donation from a sovereign.

"12. That any person claiming any interest in the premises involved but not impleaded in any such action may be made a party defendant thereto or may intervene in such action, setting up his claim in usual form.

"13. That as to all lands within the exterior boundaries of any lands granted or confirmed to the Pueblo Indians of New Mexico, by any authority of the United States of America or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise and which have not been claimed for said Indians by court proceedings then pending or the findings and report of the board as herein provided, the Secretary of the Interior at any time after two years after the filing of said reports of the board shall file field notes and plat for each pueblo in the office of the surveyor general of New Mexico at Santa Fe, New Mexico, showing the lands to which the Indian title has been extinguished as in said report set out, but excluding therefrom lands claimed by or for the Indians in court proceedings then pending, and copies of said plat and field notes certified by the surveyor general of New Mexico as true and correct copies shall be accepted in any court as competent and conclusive evidence of the extinguishment of all the right, title, and in-

terest of the Indians in and to the lands so described in said plat and field notes and of any claim of the United States in or to the same. And the Secretary of the Interior within thirty days after the Indians' right to bring independent suits under this Act shall have expired, shall cause notice to be published in some newspaper or newspapers of general circulation issued, if any there be, in the county wherein lie such lands claimed by non-Indian claimants, respectively, or wherein some part of such lands are situated, otherwise in some newspaper or newspapers of general circulation published nearest to such lands, once a week for five consecutive weeks, setting forth as nearly as may be the names of such non-Indian claimants of land holdings not claimed by or for the Indians as herein provided, with a description of such several holdings, as shown by a survey of Pueblo Indian lands heretofore made under the direction of the Secretary of the Interior and commonly known as the 'Joy Survey,' or as may be otherwise shown or defined by authority of the Secretary of the Interior, and requiring that any person or persons claiming such described parcel or parcels of land or any part thereof, adversely to the apparent claimant or claimants so named as aforesaid, or their heirs or assigns, shall, on or before the thirtieth day after the last publication of such notice, file his or their adverse claim in the United States Land Office in the land district wherein such parcel or parcels of land are situate, [sic] in the nature of a contest, stating the character and basis of such adverse claim, and notice of such contest shall be served upon the claimant or claimants named in the said notice, in the same manner as in cases of contest of homestead entries. If no such contest is instituted as aforesaid, the Secretary of the Interior shall issue to the claimant or

claimants, or their heirs or assigns, a patent or other certificate of title for the parcel or parcels of land so described in said notice; but if a contest be filed it shall proceed and be heard and decided as contests of homestead entries are heard and decided under the rules and regulations of the General Land Office pertinent thereto. Upon such contest either party may claim the benefit of the provisions of section 4 of this Act to the same extent as if he were a party to a suit to quiet title brought under the provisions of this Act, and the successful party shall receive a patent or certificate of title for the land as to which he is successful in such proceeding. Any patent or certificate of title issued under the provisions of this Act shall have the effect only of a relinquishment by the United States of America and the said Indians.

"If after such notice more than one person or group of persons united in interest makes claim in such land office adverse to the claimant or claimants named in the said notice, or to any other person or group of persons who may have filed such contest, each contestant shall be required to set forth the basis and nature of his respective claim, and thereupon the said claims shall be heard and decided as upon an original contest or intervention.

"And in all cases any person or persons whose right to a given parcel or parcels of land has become fixed either by the action of the said board or the said court or in such contest may apply to the Commissioner of the General Land Office for a patent or certificate of title and receive the same without cost or charge.

"14. That if any non-Indian party to any such suit shall assert against the Indian title a claim based upon a

Spanish or Mexican grant, and if the court should finally find that such claim by the non-Indian is superior to that of the Indian claim, no final decree or judgment of ouster of the said Indians shall be entered or writ of possession or assistance shall be allowed against said Indians, or any of them, or against the United States of America acting in their behalf. In such case the court shall ascertain the area and value of the land thus held by any non-Indian claimant under such superior title, excluding therefrom the area and value of lots or parcels of land the title to which has been found to be in other persons under the provisions of this Act: Provided, however, That any findings by the court under the provisions of this section may be reviewed on appeal or writ of error at the instance of any party aggrieved thereby, in the same manner, to the same extent, and with like effect as if such findings were a final judgment or decree. When such finding adverse to the Indian claim has become final, the Secretary of the Interior shall report to Congress the facts, including the area and value of the land so adjudged against the Indian claim, with his recommendations in the premises.

"15. That when any claimant, other than the United States for said Indians not covered by the report provided for in section 7 of this Act, fails to sustain his claim to any parcel of land within any Pueblo Indian grant, purchase, or donation under the provisions of this Act, but has held and occupied any such parcel in good faith, claiming the same as his own, and the same has been improved, the value of the improvements upon the said parcel of land shall be found by the court and reported by the Secretary of the Interior to Congress, with his recommendations in the premises.

"16. That if the Secretary of the Interior deems it to be for the best interest of the Indians that any land adjudged by the court or said Lands Board against any claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash; and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying to such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated.

"17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the lands of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

"18. That the pleading, practice, procedure, and rules of evidence shall be the same in all causes arising under this Act as in other civil causes in the Federal courts, except as otherwise herein provided.

"19. That all sums of money which may hereafter be appropriated by the Congress of the United States for the

purpose of paying in whole or in part any liability found or decreed under this Act from the United States to any Pueblo or to any of the Indians of any pueblo, shall be paid over to the Bureau of Indian Affairs, which Bureau, under the direction of the Secretary of the Interior, shall use such moneys at such times and in such amounts as may seem wise and proper for the purpose of the purchase of lands and water rights to replace those which have been lost to said pueblo or to said Indians, or for purchase or construction of reservoirs, irrigation works, or the making of other permanent improvements upon, or for the benefit of lands held by said pueblo or said Indians."

APPENDIX E

Act of June 30, 1834, c. 161, Section 12, 4 Stat. 730,
25 U.S.C. § 177

Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

APPENDIX F

In addition to the instant lawsuit involving the Pueblo of Santa Ana and Mountain Bell, in December of 1982 the following lawsuits were filed:

1. *United States of America on behalf of the Pueblos of Santa Clara and San Ildefonso, Plaintiffs v. Jemez Mountain Electric Co-op, Defendant* (CV-82-1482(M)).
2. *Pueblo of Isleta, Plaintiff v. James Watt, Secretary of the Interior; Garrey Carruthers, Assistant Secretary of Interior—Land and Water Resources; Robert N. Broadbent, Commissioner of the Bureau of Reclamation; U.S. Department of the Interior; Middle Rio Grande Conservancy District, Defendants* (CV-82-1504(C)).
3. *United States of America, on behalf of the Pueblos of Acoma, Isleta, Jemez, Laguna, Picuris, Pojoaque, San Felipe, San Ildefonso, San Juan, Sandia, Santa Clara, Santa Domingo, Tesuque, Taos and Zia, Plaintiffs v. Mountain States Telephone and Telegraph Co., Inc., and Continental Telephone Company of the West, Defendants* (CV-82-1513(C)).*
4. *Pueblo of Sandia, Plaintiff v. Western Union Telegraph Co. and Postal Telegraph-Cable Co., Defendants* (CV-82-1521(M)).
5. *Pueblo of Sandia, Plaintiff v. New Mexico State Highway Commission and New Mexico State Highway Department; Board of County Commissioners of Bernalillo County, New Mexico; Board of County Commissioners of Sandoval*

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* Mountain Bell has entered into Agreement with the Pueblos of Picuris and Pojoaque and has, or will soon be, dismissed from this action as to those Pueblos.

County, New Mexico; and State of New Mexico; and State of New Mexico, Defendants (CV-82-1522(C)).

6. *Pueblo of Sandia, Plaintiff v. Mountain States Telephone and Telegraph Company; Colorado Telephone Company; Tri-State Telephone and Telegraph Company; Rocky Mountain Bell Telephone Company, Defendants* (CV-82-1528(M)).
7. *Pueblo of Isleta, Plaintiff v. Gas Company of New Mexico; New Mexico Gas Company; Southern Union Gas Company; Southern Union Company, Defendants* (CV-82-1532(C)).
8. *Pueblo of Isleta, Plaintiff v. Western Union Telegraph Co. & Postal Telegraph-Cable Co., Defendants* (CV-82-1533(M)).
9. *Pueblo of Isleta, Plaintiff v. Public Service Company of New Mexico, and Albuquerque Gas and Electric Company, Defendants* (CV-82-1535(C)).
10. *Pueblo of Sandia, Plaintiff v. James Watt, Secretary of the Interior; Garrey Carruthers, Assistant Secretary of Interior—Land and Water Resources; Robert N. Broadbent, Commissioner of the Bureau of Reclamation; U.S. Department of the Interior; Middle Rio Grande Conservancy District, Defendants* (CV-82-1536(M)).
11. *Pueblo of Isleta, Plaintiff v. Atchison, Topeka and Santa Fe Ry. Co., Defendant* (CV-82-1537(C)).
12. *Pueblo of Isleta, Plaintiff v. Mountain States Telephone and Telegraph Company; Colorado Telephone Company; Tri-State Telephone and Telegraph Company; Rocky Mountain Bell Telephone Company, Defendants* (CV-82-1539(M)).
13. *Pueblo of Sandia, Plaintiff v. Margaret Ann Willington, et vir., Eugenio C. Tapia et ux., Reese Caudill et ux., Jerry D. Winker et ux., William E. Proffer et ux., William A. Gateley et ux., Eugene*

C. Gunther et ux., Diana Baca et vir., Paul E. Deardeuff et ux., Detlef Z. H. Phillips et ux., Marion E. Brown et ux., and Unknown Claimants of Interest in the Premises Adverse to that of the Plaintiff, Defendants (CV-82-1543(C)).

14. *Pueblo of San Juan, Plaintiff v. Mountain States Telegraph and Telephone Co. and Mountain States Telephone Co.; Continental Telephone Co. of the West; Trampas Lumber Co.; Federal Tie and Lumber Co.; Espanola Telephone Co., Defendants* (CV-82-1547(C)).

15. *Pueblo de Acomo, Plaintiff v. Atchinson Topeka and Santa Fe Ry. Co., Defendant* (CV-82-1550 (JB)).

16. *Pueblo de Acoma, Plaintiff v. New Mexico and Arizona Land Company; State of New Mexico, Defendants* (CV-82-1551 (JB)).
